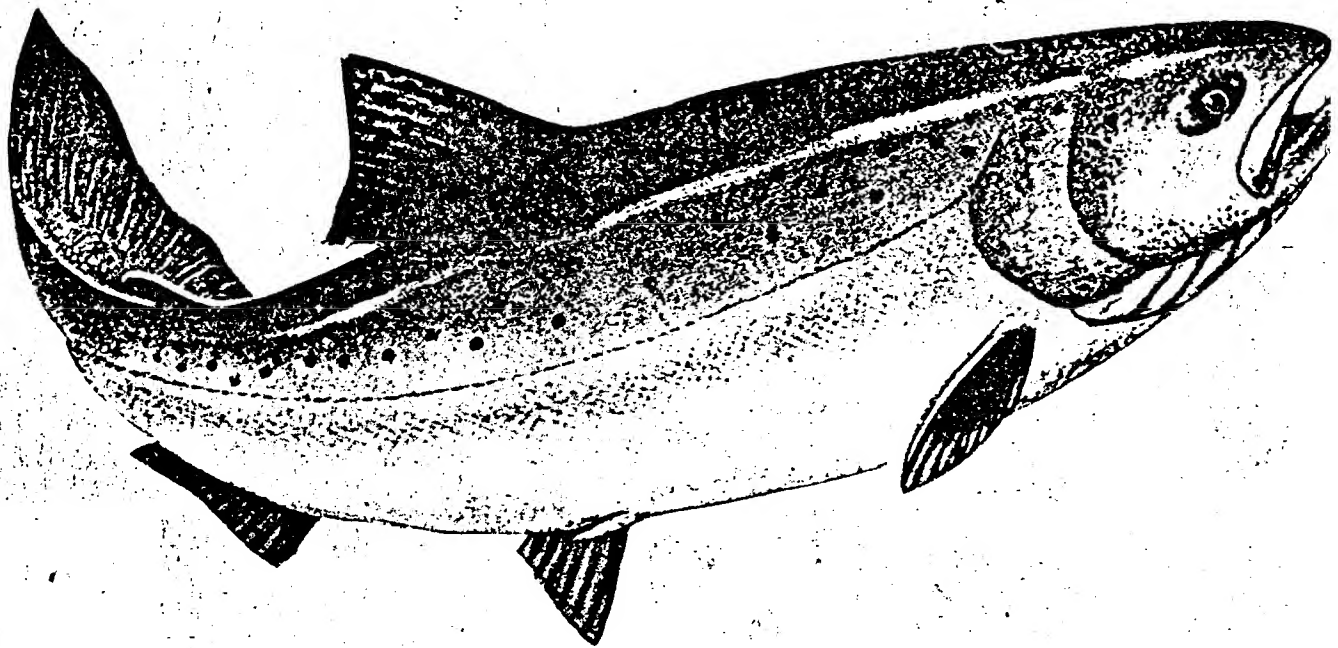


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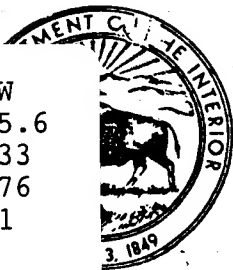
INDIAN FISHING RIGHTS IN THE PACIFIC NORTHWEST



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INDIAN TREATY FISHING RIGHTS IN THE PACIFIC NORTHWEST

The question of off-reservation fishing rights of Treaty Indians in the Pacific Northwest and the degree - if any - to which those rights may be regulated by the State governments, has been a matter of deep and continuing controversy for over a century.

The major recent development in this longstanding dispute is the landmark decision of U.S. District Judge George H. Boldt in the case of United States v. Washington, 384 Fed. Supp. 312 (W.D. Wash, 1974) affd. 520 F 2d 676 (9th Cir, 1975) decided in Tacoma, Washington, on February 12, 1974, in a lawsuit filed more than three years earlier.

In the course of his 209-page decision, Judge Boldt noted that:

"... More than a century of frequent and often violent controversy between Indians and non-Indians over treaty right fishing has resulted in deep distrust and animosity on both sides. . ."

"... in the past, root causes of treaty dissension have been an almost total lack of meaningful communication on problems of treaty right fishing between State, commercial and sport fishing officials and non-Indian fishermen on one side and tribal representatives and members on the other side, and the failure of many of them to speak to each other and act as fellow citizens of equal standing as far as treaty right fishing is concerned. . ."

Judge Boldt expressed confidence that "the vast majority of the residents of this State, whether of Indian heritage or otherwise, and regardless of personal interests in fishing, are fair, reasonable and law abiding people. . .and they will accept and abide by those (treaty rights) decisions even if adverse to interests of their occupation or recreation activities. "



The purpose of this background paper is to set forth as succinctly as possible the key elements of Judge Boldt's decision - what it says and what it means - including the historical context in which it occurred, and to summarize some of the more important events that have taken place since the decision was made. It is presented in the hope that it will contribute to the "meaningful communication" among "fair, reasonable and law abiding" people that is essential to a final resolution of this divisive issue.

UNIQUE STATUS OF INDIAN FISHING RIGHTS

To put this longstanding dispute in perspective, it is necessary to understand the unique, historical status of Indian fishing rights.

In the Act creating the Oregon Territory and opening the area to non-Indian settlement, Congress declared that the Indians' property rights in the Territory were not to be impaired "so long as such rights shall remain unextinguished by treaty between the United States and such Indians. . ." (9 Stat 323)

Today's off-reservation fishing rights of Indians are based on a series of treaties negotiated between the United States government and Indian tribes in the mid-1850's, pursuant to that policy. These treaties provided in language similar to the following from the Medicine Creek Treaty, that:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing. . ." (10 Stat 1132)

Court decisions have consistently held that these rights became the supreme law of the land protected by Article Six of the United States Constitution, "and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." Therefore they could not be interfered with by States. Thus treaty Indians had a different status than non-Indians whose fishing activities are subject to whatever policies or reasonable restrictions the States see fit to impose.

Furthermore, the Indian treaties were not a grant of rights to the Indians, but rather a grant of rights from them to the non-Indians, with the Indians reserving to themselves those rights not granted. The treaties specifically protect those reserved rights. These basic principles of Federal law, which undergird the decisions in Indian treaty rights cases, have been the subject of much misunderstanding and some non-Indians have found them difficult to accept.

CHRONOLOGY OF RECENT LEGAL DEVELOPMENTS

There follows here a brief chronology of recent legal developments in the treaty fishing rights dispute involving cases in Washington, Oregon and Idaho

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|----------------|--|
| Nov. 4, 1963 | Washington Departments of Fisheries and Game filed suit in State Court to establish state authority to prohibit net fishing by Indians in off-reservation river fisheries. Indians later appealed adverse rulings to U.S. Supreme Court. |
| May 27, 1968 | U.S. Supreme Court, in <u>Puyallup Tribe of Indians v. Department of Game</u> , held that State of Washington could restrict Indian net fishing when necessary for conservation of resource and returned case to State Court to determine if existing regulations were "necessary". (391 U.S. 392) |
| Sept. 13, 1968 | United States filed suit in Oregon U.S. District Court against State of Oregon seeking judgment and injunction to enforce Indian off-reservation fishing rights in the Columbia River watershed. |

July 5, 1969 U.S. District Judge Robert Belloni rendered decision in Sohappy v. Smith (United States v. Oregon). (302 Fed. Supp. 899)

Aug. 8, 1969 Washington Departments of Fisheries and Game petitioned State Superior Court for further clarification of state regulatory authority and Indian fishing pursuant to 1968 Supreme Court decision.

Sept. 18, 1970 Case of United States v. Washington, filed in U.S. District Court, Tacoma. 14 tribes subsequently intervened.

June 8, 1972 Idaho Supreme Court followed the Sohappy case and held, in State v. Tinno (497 P 2d 1386), that Idaho cannot regulate Indian treaty fishing "unless it clearly proves regulation of the treaty Indians' fishing in question to be necessary for preservation of the fishery." As part of its conservation program, the State "must extend full recognition to these rights and the purposes which underlie them."

Nov. 19, 1973 U.S. Supreme Court decision in "Puyallup II" case upheld Indian right to net fish commercially for steelhead and returned case to State courts to determine a formula for allocation of the steelhead between the Indians and the sport fishermen that is equitable to both groups. (414 U.S. 44)

Feb. 12, 1974 U.S. District Judge George Boldt rendered decision in United States v. Washington and retained continuing jurisdiction.

March 22, 1974 Interim Plan for implementation of decision in United States v. Washington approved by Judge Boldt and placed into effect. Judge Boldt appointed Fisheries Technical Advisor to advise him and designated Master to hear subsequent matters as specifically assigned.

April 1974 Defendants and Indian tribes in United States v. Washington appealed Boldt decision to U.S. Ninth Circuit Court of Appeals in San Francisco.

April 1974 to October 1975 Thirteen additional Tribes intervened in U.S. v. Washington.

April 29, 1974 State of Washington intervened in U.S. v. Oregon in U.S. District Court for Oregon.

- May 8, 1974 U.S. District Judge Belloni rendered supplemental decision in U.S. v. Oregon holding that Indian treaty fishermen are entitled to have the opportunity to take up to fifty percent of the harvest of the spring chinook destined to reach the tribes' usual and accustomed fishing places on the Columbia River. Washington and Oregon appealed the decision to the Ninth Circuit Court of Appeals.
- Nov. 26, 1974 U.S. Ninth Circuit Court of Appeals held that under the treaties the Indian tribes reserved the authority to regulate tribal fishing at all usual and accustomed places on or off the reservation. The State has limited authority to regulate in the interest of conservation but tribes have broader authority to prescribe conditions under which members may exercise the treaty right and may arrest and prosecute members for violation. Settler v. Lameer, 507 F 2d 231.
- Dec. 19, 1974 Pierce County Superior Court held that Puyallup Indian treaty right does not extend to steelhead artificially propagated by the Washington Department of Game and that the Tribe must allow these fish to pass through the Puyallup Reservation to fishing areas open to sportsmen. Tribe appealed to Washington Supreme Court.
- Jan. 14, 1975 Judge Boldt enjoined Washington from excluding hatchery-produced steelhead from the Indian treaty entitlement on rivers other than the Puyallup pending final determination of that question by a Federal Court.
- April 18, 1975 Judge Boldt expanded U.S. v. Washington decision to extend to herring fishing rights. Approved sac-roe herring fishery management plan for 1975 which allocated the off-reservation commercial catch in equal shares to Indians and non-Indians.
- June 4, 1975 U.S. Ninth Circuit Court of Appeals affirmed Judge Boldt's decision in U.S. v. Washington; rehearing denied July 23, 1975. (520 F 2d 676)
- July 19, 1975 U.S. State Department disapproved portion of International Pacific Salmon Fisheries Commission regulations which divided authorized U.S. fishing time among specific types of gear. Judge Boldt ordered State to permit Indians to fish with any type of gear during entire period open to U.S. fishermen under International Pacific Salmon Fisheries Commission regulations.

- Aug. 20, 1975 U.S. District Judge Belloni issued supplemental order in U.S. v. Oregon declaring that States must assure that the treaty Tribes have an opportunity to take up to fifty percent of the harvest of Columbia River fall chinook salmon which the States permit to be taken by all user groups of fish destined to reach the Tribes' usual and accustomed fishing places. The States are directed to promulgate comprehensive rules in cooperation with the Indians.
- Sept. 15, 1975 Washington Supreme Court heard oral argument on appeal from Pierce County Superior Court holding regarding artificially propagated steelhead.
- Oct. 20, 1975 Washington filed petition for certiorari with U.S. Supreme Court to review U.S. v. Washington decisions.
- Oct. 21, 1975 In subsequent rulings Judge Boldt enjoined or limited Indian on-reservation fishing in several instances where he found such restriction necessary to assure adequate spawning escapement.
- Oct. 22, 1975 Judge Boldt ruled that he has jurisdiction to restrict Indian on-reservation fishing on runs affected by his decree when necessary to carry out his decree or preserve the runs. Puyallup and Nisqually Tribes appealed this ruling to the U.S. Ninth Circuit Court of Appeals.
- Oct. 27, 1975 Judge Boldt named a Fisheries Advisory Board consisting of one state representative and one Indian representative to consider and attempt to reach agreement on fisheries regulatory matters prior to their being submitted to the Court for judicial determination.
- Oct. 27, 1975 Judge Boldt ordered the State to allow Indians to take a greater share of the 1975 harvestable chum salmon as an "equitable adjustment" for the "substantial and significant" denial of their opportunity to take an equal share of 1975 coho salmon due to unauthorized fishing by non-treaty fishermen and enforcement problems connected therewith. State courts had hampered enforcement against non-treaty fishing that was "in direct violation" of the Federal Court's order.
- Jan. 26, 1976 The United States Supreme Court declined to review U.S. v. Washington thereby affirming Judge Boldt's Decision and the ruling of the U.S. Ninth Circuit Court of Appeals.
- Jan. 28, 1976 Ninth Circuit Court of Appeals affirmed Judge Belloni's Order of May 8, 1974 Supra.

UNITED STATES V. WASHINGTON

The suit was filed against the State of Washington on September 18, 1970, in the U.S. District Court, Western Washington District, Tacoma, by the U.S. Department of Justice at the request of the U.S. Department of the Interior, acting on behalf of the United States and as trustee for several Indian Tribes.

During the initial trial 14 Indian Tribes 1/ participated in the case as Plaintiff and the Washington Department of Fisheries and the Washington Game Commission, 2/ their respective directors, and the Washington Reef Net Owners Association were included as defendants. Following the initial decision 13 additional Tribes were granted intervention to participate in the continuing jurisdiction proceedings. 3/

Several other interests, including non-Indian commercial and sports fishermen's groups, also sought to intervene or participate. These interests were not admitted as parties, but were allowed to participate amicus curiae.

1/ The tribes were Hoh, Makah, Muckleshoot, Nisqually, Puyallup, Quileute, Skokomish, Lummi, Quinault, Sauk-Suiattle, Squaxin Island, Stillaguamish, Upper Skagit River and Yakima Nation.

2/ Under Washington State law, the Fisheries Department regulates all food fish, including salmon, while the anadromous steelhead trout is regulated by the Game Commission.

3/ These Tribes were Lower Elwha, Nooksack, Port Gamble, Suquamish, Swinomish Tribal Community, Tulalip, Duwamish, Jamestown Clallam, Samish, Snohomish, Snoqualmie, Steilacoom and Swinomish Tribe (Aboriginal). As of this writing determination of treaty rights has been made only for the first six of these. However, Judge Boldt has allowed four of the unrecognized Tribes to fish provisionally under regulations of recognized Tribes pending final determination of their treaty rights.

The geographical area covered by the case is that portion of the State of Washington west of the Cascade Mountains and north of the Columbia River drainage area, and includes the U.S. portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of Grays Harbor watershed, and the off-shore waters adjacent to those areas. Subsequent to the basic decision the Court held that this limitation of the area to which the U.S. v. Washington decision is applicable does not restrict any treaty rights the tribes may have outside that area and specifically doesn't restrict the Quinault Tribe's treaty rights in the Grays Harbor watershed.

A basic issue in United States v. Washington involved the degree to which the State could regulate and restrict the off-reservation fishing rights of the Treaty Indians, and whether existing state laws and regulations were discriminatory against the Indians.

The question of on-reservation fishing was not an issue in the lawsuit, all parties conceding that Indians have an exclusive right to fish within their reservations that is not subject to state regulation.

In two recent cases (1968 and 1973) involving the Puyallup Tribe and the State of Washington, the U.S. Supreme Court ruled that the State had the authority to regulate off-reservation treaty fishing if necessary to preserve the fish runs, providing such regulations met certain standards and were not discriminatory against the Indians.

On June 4, 1975, the Ninth Circuit Court of Appeals affirmed all major aspects of Judge Boldt's decision. It held that in giving up their land the Indians had not given up their right to fish. That right was protected by the United States.

"They relinquished millions of acres of their lands, retiring to reservations carved out of these lands. But they expressly reserved their indispensable rights to fish at their traditional places. The United States obtained for the settlers and for the subsequently admitted state only the right of equal access to these fishing grounds. The treaty provision at issue grants the State's other citizens only a limited right to fish at treaty places; it thus is "express federal law" preempting all state regulation of Indian fishing at the treaty fishing grounds, except as hereafter stated."

The Appeals Court also affirmed the State's limited right to regulate for conservation. As well as the provisions of the District Court's decision allowing Tribal regulation where the appropriate conservation requirements were met.

One of the prime concerns of the State was that affirmance of the main decision would lead to the court acting as a super regulating body. The Court of Appeals felt, however, that this was a case justifying the continued intervention of the Court. The concurring opinion of Judge Burns said:

"The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal

clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the District Court. This responsibility should neither escape notice nor be forgotten."

The State's motion for rehearing before the Ninth Circuit was denied and the State petitioned for review by the United States Supreme Court. The U.S. Supreme Court declined to review and thereby let stand the ruling of the U.S. Ninth Circuit Court and Judge Boldt's Decision.

In United States v. Washington, Judge Boldt held that the treaty right extended to "all usual and accustomed grounds and stations" which he defined as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then fished in the same waters." He said, however, that the term did not include places "used infrequently or at long intervals and extraordinary occasions."

The treaties secured to the Indians the right to fish "in common" with non-Indians. This means that neither group may preempt the fishery. But it does not mean the status of each group of fishermen is the same. The State and many non-Indians have argued that this provision of the treaty means that each Indian is to have access to the fishing grounds on the same footing as each settler--that the State can impose on each individual Indian the same restrictions it imposes on each individual non-Indian. But the Ninth Circuit Court of Appeals said "The Supreme Court long ago considered this construction * * * and rejected it."

The Court of Appeals pointed out that the treaties were entered into between the United States and Indian tribes "on the basis of formal equality." As a result "the State shares its rights in those fisheries with another party." "An attempt to partition equitably rights which these parties were to hold in common must reflect this initial equality." The Court further said that although the State's management program "may appear sound and commendable" the State "may not force treaty Indians to yield their own protected interests in order to promote the welfare of the State's other citizens."

The Indian tribes reserved a right to take fish. The State, in allowing non-Indians to fish, cannot act to diminish that right. It must curtail non-Indian fishing which interferes with that right.

Judge Boldt held that "in common with" means sharing equally the opportunity to take fish that would normally reach the off-reservation usual Indian fishing places. Thus each party--the Indians on the one hand and the non-Indians on the other--is entitled to the opportunity to harvest up to 50% of the harvestable numbers of such fish.

This has been one of the most widely discussed provisions of the Court's decision. Several features of it should be noted. First, the Court strictly limited the fishing right to those fish not needed for maintaining the runs. "Harvestable fish" are only those above the numbers needed to assure adequate escapement for spawning. Second, the fish to be shared include the fish that would reach the Indian usual fishing grounds if they hadn't been caught previously by fishermen who are subject to State control. This includes some

of the fish taken in the ocean fisheries by Washington-based fishermen as well as those taken in the State's inland marine waters located ahead of the Indian fishing areas. Third, because of the "special treaty significance" to Indians of fish for traditional Indian religious and other ceremonies and personal subsistence, the Court excluded the relatively small amounts of fish actually used for those purposes from the sharing formula. It also excluded fish taken on the reservations since the treaties reserved these areas exclusively for the Indians.

A similar case - Sohappy v. Smith (United States v. Oregon) - involving regulation of off-reservation Indian treaty right fishing in the Columbia River watershed was decided in 1969 by U.S. District Judge Robert Belloni, Oregon District. 4/ The decisions are similar in that both judges ruled that the State's authority over Indian treaty-right fishing is limited to the minimal regulation that is "necessary" for the preservation of the fishery resource. Judge Boldt went further, however, in recognizing the role of tribal self-regulation, holding that where a Tribe demonstrates to the satisfaction of the court that it is able and willing to self-regulate in a manner that protects the fish runs, further State regulation is not necessary and may not be exercised. Both judges retained jurisdiction over their respective cases and in April 1974 the State of Washington, which maintains concurrent jurisdiction with Oregon over the Columbia River, became an Intervenor-Defendant in the Belloni case. The original Belloni decision was not appealed, but a subsequent ruling of April 1974 adopting the Boldt allocation formula has been appealed to the Ninth Circuit Court of Appeals in San Francisco. No decision has yet been rendered. (But see below

4/ The Tribes involved in this case are Nez Perce, Umatilla, Warm Springs and Yakima.

for Court of Appeals decision in the U.S. v. Washington appeal.) In August 1975 Judge Belloni ordered the two States, with the cooperation of the tribes, to promulgate a comprehensive plan to assure the treaty Tribes an opportunity to take up to 50% of the harvest of Columbia River salmon destined to reach the Indians' fishing grounds which the states permit to be taken by all users.

STATE REGULATION

As noted earlier, the Supreme Court in the Puyallup cases established the principle that the State has limited power to regulate off-reservation fishing by Indians "to the extent reasonable and necessary for conservation of the resource." Such regulations, however, cannot discriminate against the Indians, and the State is required to find "the least restrictive means" of regulating Indian fishing in the interests of conservation. "Conservation" in this context was defined by Judge Boldt as the perpetuation of a particular run or species.

In his decision, Judge Boldt said that because of the Supreme Court holdings he could not accept the Indians' claim to total immunity from state control. He also rejected the State's claim to sole determination of how the fishery resource shall be utilized. Instead, the decision strongly encourages the State and the tribes to work together as partners in the regulation of the harvest of this resource which, under the treaty, is to be shared "in common."

Judge Boldt, while upholding the State's right to regulate for conservation, pointed out that such regulation "is highly obnoxious to the

Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future" (384 F.Supp. at 339), an observation that has been amply confirmed in the period following the decision. Partly because of this and partly in recognition of "the intent and philosophy of Congress to increase* * * the exercise of tribal self-government" he adopted a formula for greater assumption of tribal self-regulation of its off-reservation reserved fishing right. This is discussed more fully on page 18 herein.

Judge Boldt (like Judge Belloni in the Oregon case) exempted treaty Indians from the applicability of certain state laws and regulations which he found violated the treaty provisions. He also directed that the state regulations affecting Indian fishing be published separately from general fishing regulations and that the State bear the burden of establishing that they are essential to conservation.

Still unresolved is the issue of the extent, if any, to which artificially propagated fish, especially steelhead, should be included in determining the Indians' share in the allocation formula. The Supreme Court expressly left this issue undetermined and Judge Boldt has initially deferred consideration of it until the State Supreme Court has an opportunity to deal with it in the remanded Puyallup case. The matter is now before the Washington Supreme Court on appeal from a Superior Court ruling that the treaty didn't apply to steelhead planted in the Puyallup River from a wholly state-financed hatchery.

FRASER RIVER SOCKEYE AND PINK SALMON RUNS

One of the major fisheries in the case area is on the runs of sockeye and pink salmon destined for Canada's Fraser River, but first passing through United States waters. Harvest of these fish is regulated by the International Pacific Salmon Fisheries Commission set up under a treaty between the United States and Canada. This six-member commission consists of three members from the United States, appointed by the President, and three from Canada. It recommends initial regulations annually which, to the extent approved by each Government, are then adopted and enforced by domestic authorities of each country. In the United States the normal pattern is for the State of Washington to adopt the approved regulations as state regulations. The International Commission is charged only with assuring an adequate escapement and allocating the allowable catch of these two runs equally to each country. The international treaty is not concerned with how each country catches or divides its share.

Judge Boldt held that the treaty Indians are subject to regulatory restrictions required of the United States by the international treaties; but he also held that the international treaties did not appear to be inconsistent with the Indian treaties. The United States State Department (which supervises our commissioners' actions under the international treaty) said, and Judge Boldt agreed, that Washington could and should limit non-Indian fishing within the periods allowed by the International Commission so as to give Indians a more equal opportunity to catch their share of U.S. entitlement as prescribed by the Court's basic decision. In 1975 this view was disputed by the State and particularly by a lower State court which held that the Director of

Fisheries had no authority to further restrict non-Indian fishermen. The State court also held that the International Commission's recommended regulation restricting various portions of the open period to a particular type of gear were binding on the Director even though the United States Government, acting through the Department of State, had disapproved those portions of the regulation. This conflict between the orders of the Federal and State courts has proven very troublesome during 1975 and remains unresolved. Appeals are pending in both the Ninth Circuit Court of Appeals and the State Supreme Court. The Thurston County Superior Court's actions have hampered the Director of Fisheries' fulfillment of the Federal Court's order to "make significant reductions in the non-Indian fishery" necessary to assure the Indians their opportunity to take their share of the fish.

THE STEELHEAD CONTROVERSY

One of the most emotion-charged aspects of the Indian fishing rights controversy is the issue over Indian commercial fishing for steelhead.

The Indian position, which is supported by the Federal Government, is that the treaties made no distinction between species of fish--i.e., food versus game--and that the Indians' major concern in the treaty was to reserve their right to take fish for purposes that were most meaningful to them. For centuries they have fished for and traded commercially salmon and steelhead without distinction.

For many years after the treaties were signed, non-Indians in the Pacific Northwest likewise engaged in commercial fishing for steelhead using the same capture methods utilized in the taking of salmon.

In 1925, the Washington State Legislature declared steelhead a game fish, although commercial harvest of this species was not totally prohibited until 1933. Oregon also classifies the steelhead as a game fish, although until 1975 it permitted the sale of steelhead caught "incidentally" while fishing commercially for salmon.

Today steelhead are managed and propagated by the States exclusively for recreational fishing and the fishing occurs almost exclusively in the rivers. The popularity of the sport has mushroomed, especially since World War II.

The State management program is financed primarily from sport license fees, although Federal funds and certain mitigation funds are also used.

To the dedicated "steelheader" the taking of this anadromous trout by nets or traps borders on sacrilege. But to the Indian, to whom fishing is not a sport but a means of livelihood, net fishing for steelhead is a traditional expression of his cultural heritage that has strong economic and religious overtones. For a number of Western Washington tribes it provides a source of income and subsistence during winter months when few salmon are available.

Both Judge Boldt and Judge Belloni have applied the Supreme Court holding that treaty rights extend equally to steelhead and salmon and that both may be taken commercially by treaty Indians at "the usual and accustomed places."

TRIBAL REGULATION OF INDIAN FISHERIES

One of the most important elements of the decision in United States v. Washington deals with tribal self-regulation of their members' off-reservation treaty right fishing.

While noting the Supreme Court decisions giving states the power to regulate off-reservation fishing to preserve the resource, Judge Boldt ruled that where a tribe demonstrates to the satisfaction of the Court that it is able and willing to self-regulate in a manner that will protect the fish runs, then further state regulation is not necessary and may not be exercised except where the state first applies to the court for an order allowing the regulation and such regulation is necessary for the perpetuation of the run.

In so ruling, he cited long-standing Federal policy which recognizes Indian tribes as entities having powers of self-government that are limited only by the treaties, judicial interpretation thereof, or by the Congress. He noted further that the recent intent and philosophy of Congress is "to increase rather than diminish or limit the exercise of tribal self-government" and that "the right to fish. . . is the single most highly cherished interest and concern" of present members of the Northwest Tribes.

Judge Boldt established a series of qualifications and conditions that a Tribe must achieve and maintain before gaining self-regulating status. The qualifications specified are:

- a. Competent and responsible leadership.
- b. Well-organized tribal government competent to adopt and apply proper regulations.
- c. Indian personnel trained and competent to enforce the regulations.

- d. Readily available fisheries experts to advise on regulation.
- e. An officially approved membership roll.
- f. Membership certification and appropriate I.D. cards with photograph.

The conditions specified are:

- a. Adopt full and complete tribal fishing regulations, including reasonable and necessary conservation restrictions, after consultation with State agencies.
- b. Permit State monitoring of off-reservation Indian fishing.
- c. Provide on and off-reservation catch reports to State.

Judge Boldt found that the Yakima and Quinault Tribes are now qualified for self-regulation and that the achievement of this status is potentially within the capability of every Plaintiff Tribe.

The decision stressed that state regulation for non self-regulating Tribes is strictly limited to specific measures which have first been found, to the satisfaction of the affected Tribes or the Court, to be "reasonable and necessary to prevent demonstrable harm to the actual. . . perpetuation of a particular run or species of fish." (This provision has been suspended during the period of the Interim Plan discussed below.)

INDIAN MANAGEMENT OF THE FISHERY RESOURCE

Conservation of wildlife has been an important part of the Indians' religious and cultural heritage for centuries. In the past the Tribes' survival often depended upon preservation of the salmon runs. Today fishing still provides an important part of their livelihood and it is in their own economic self-interest to manage the resource wisely.

The Joint Biological Statement prepared by the Washington Departments of Fisheries and Game and the U.S. Fish and Wildlife Service as a technical document for United States v. Washington points out that "contemporary expertise in fishery management has grown considerably within the Northwest Indian community since 1965 as a number of Indian students have been trained as fishery technicians and a few have received college degrees in fishery biology."

In discussing Indian fishery management objectives, the statement notes that these "objectives today include the development of their economic well being and the preservation of their cultural heritage and way of life. Their goals were and are to maintain the fishery stocks at a level compatible with the carrying capacity of the environment and provide the needed harvest."

"Indian Tribes," the statement notes, "have been cognizant of the deteriorating conditions of the freshwater habitat. Many have called attention to, and requested assistance in correcting, the adverse effects of poor logging practices and industrial, municipal, agricultural, and other water developments for power and flood control."

In addition to their own developing expertise, the Indians have available to them through the Bureau of Indian Affairs technical assistance from the U.S. Fish and Wildlife Service and, on occasion, from the Washington Departments of Fisheries and Game. A number of Tribes and Indian organizations such as the Small Tribes of Western Washington (STOWW) have hired biological advisors.

The Quinault National Fishery Hatchery, operated by the U.S. Fish and Wildlife Service, is now in full production on the reservation and will help build back the runs lost by destruction of spawning areas, to the benefit of both Indian and non-Indian fishermen. National Fish Hatcheries also are under construction on the Makah and Warm Springs Indian reservations.

Several Tribes, including the Tulalip, the Quinault and the Squaxin Island, have operated salmon rearing projects for years. The Lummi Indians in northern Puget Sound have helped re-establish runs in the Nooksack River through their aquaculture project which has been financed by tribal money, private funds and Federal grants.

In some cases, for example, the Yakima, Umatilla, Warm Springs, Quinault, and Skokomish Tribes, Indians have shared their reservation fishery resource with non-Indians through a permit system.

U.S. V. WASHINGTON INTERIM PLAN

On March 22, 1974, an Interim Plan that had been developed by both sides was approved by the court and placed into effect. The Interim Plan did not alter the rights declared by the court to belong to treaty Indians, but it did modify the duties of both the Indians and the State somewhat, in order that the rights of the Indians and the responsibilities of the State may eventually be fully realized. Tribes which are found to be self-regulating are not bound by the Interim Plan as long as they continue to meet the specifications and conditions established in the court's basic decision.

A principal feature of the Interim Plan is that effective June 1, 1974, all Indian off-reservation fishing places are closed unless specifically opened by tribal regulations filed with the court.

The plan also provides the following:

- 1) The State will recognize provisions of tribal regulations (subject to its right to challenge them in court) and any Indians fishing contrary to tribal regulations will be subject to State law as applied to the general public.
- 2) The Tribes are to give the State an opportunity to review tribal regulations before they are filed with the court.
- 3) The State will make significant reductions in non-Indian fishing as necessary to achieve the ultimate objectives of the February 12 decision. Mathematical precision is not required, but in making reductions, the State will do so consistent with the concept of permitting a full harvest of fish.
- 4) The State and Tribes will monitor the fishery and exchange data.

PROGRAM TO IMPLEMENT INTERIM PLAN

Subsequent to the development of the interim plan the court adopted a "Program to Implement the Interim Plan" in September 1974. The program was accepted by all parties as a way of dealing with the problems that were bound to surface during the period needed to fully implement the decision. It provided for the following:

- 1) All parties were to prepare guideline principles for the regulation of the fishery;
- 2) Both the Tribes and the State agencies are to exchange data and proposed regulations on a fixed time schedule;
- 3) Closure of either the Indian or non-Indian fishery when such fishery had taken its share and such closure would benefit the other fishery and not result in a waste of harvestable fish;
- 4) Prompt and standardized catch reporting so as to improve both the timeliness and the accuracy of the available data;
- 5) An interim method allowing recently intervened tribes to fish after making a prime facie showing of treaty entitlement; and
- 6) An interim method for determining treaty entitlement to harvest non-anadromous fish pending final determination.

The providing for the sharing of data and for a schedule for the submission and discussion of proposed regulations among the affected parties were key elements to placing the Indian tribes near an equal footing with the State as each would have an opportunity to evaluate and comment on the other's regulations.

The key feature of the Boldt decision is its recognition that (in the words of the Court of Appeals) "the State shares its rights in those fisheries with another party." Because of this the Boldt decision prescribes for a scheme of co-management of the resource that is the subject of this shared right. Such a co-management concept is not new to the Pacific

Northwest, Washington and Oregon (and to a lesser extent Idaho) have co-managed the Columbia River fisheries in which each of these States has an interest for years. The United States and Canada co-manage the extensive Fraser River sockeye and pink salmon runs. There have been some elements of co-management of certain runs or rivers between separate commercial and sports-oriented management agencies within a single State. Co-management may present a challenge to the abilities of those with divergent interests to work together; but it is not an impossibility.

Judge Boldt, and to a lesser extent Judge Belloni, have called upon the States and the Tribes to practice co-management of the resource they share. The judges have backed this with provision for continuing judicial oversight and interposition wherever co-management fails to respect the rights of either party.

RECENT ACCOMPLISHMENTS FROM COURT DECISION

There have been a number of accomplishments affecting management of the treaty Indian fishery resulting from the decision in U.S. v. Washington. In an effort to provide a more centralized vehicle for the development and expression of Indian views the tribes in the case area have established a five-member Northwest Indian Fisheries Commission consisting of one commissioner elected by Tribal representatives of each of the five western Washington treaty areas. The Commission has hired an Executive Director and staff and maintains a full-time office in Olympia. It serves as a coordinating agency on matters affecting the Indian fisheries. Working

together the Bureau of Indian Affairs, the U.S. Fish and Wildlife Service and the Indian Tribes have developed individual identification cards with the holder's picture and signature which have been issued to all authorized Indian fishermen in the case area. They have also developed and put into operation a uniform method of fishing vessel identification and identification tags for Indian fishing gear. Tribal membership rolls are being up-dated, a standardized fish receiving ticket has been developed by the Washington Department of Fisheries, the U.S. Fish and Wildlife Service and the tribes to record treaty Indian commercial catch data. In some instances joint enforcement patrols by State, Tribal and Federal fisheries or game officials have been undertaken.

NONANADROMOUS FISH

The original decision in U.S. v. Washington was limited to the treaty rights as they applied to salmon and steelhead. However, the Court recognized that Indian treaty rights are not limited to these species. In subsequent proceedings the Court approved a program for safeguarding the treaty rights as they apply to the herring fisheries. The joint and closely monitored program for the sac-roe herring fishery in northern Puget Sound was placed in operation in 1975 under an agreed-upon-set of joint management principles. The committee, consisting of the Court's Fisheries Technical Advisor, a biologist of the Washington Department of Fisheries and a biologist of the U.S. Fish and Wildlife Service, monitored this fishery on a daily basis and recommended necessary changes in the State and Tribal regulations to carry out the equal sharing principle.

TREATY INDIAN FISHING ON THE COLUMBIA

Originally, in the case of United States v. Oregon, involving the Columbia River watershed, (see page 12 above) Judge Belloni held that the State must give the Indians an opportunity to attempt to take "a fair and equitable share of all fish which the State permits to be taken from any given run," without defining what that share was. Beginning in 1974 he adopted the 50 per cent allocation formula established by Judge Boldt in the Washington case.

On May 9, 1974, Judge Belloni held that the State agencies had not complied with the standards of his 1969 decision because they had not considered less restrictive alternatives to a total closure of Indian fishing and had failed adequately to provide the Indians a meaningful role in the rule-making process.

In August 1975, he expressed further concern over the continued failure of the States to adopt "a comprehensive plan to assure a fair share to all parties." As a result of this, he noted that problems are frequently brought to the Court under its continuing jurisdiction "as emergency problems because they involve a current run of one of the species of Columbia River fish. The runs sometimes last only a few days. The motions are always the result of the two States' agency action taken only a few days earlier. The process results in hasty decisions in which neither party has the opportunity for a full briefing and argument on some of the most important principles of law."

Judge Belloni directed the States, in cooperation with the Tribes, to develop and promulgate comprehensive rules. He said the Court was ready to rule on any basic legal principle where such a ruling would facilitate the rule-making process. The States, Tribes and Department of the Interior are currently working on the development of such a plan.